STATE OF MINNESOTA
IN COURT OF APPEALS
A09-936
A09-1406

In the Matter of the Request for a Contested Case Hearing and Revocation and Reissuance of NPDES/SDS Permit No. MN 0068594 for The Dairy Dozen - Thief River Falls, LLP (doing business as: Excel Dairy) concentrated Animal Feedlot Facility Excel Township, Marshall County, Minnesota (A09-936)

and

In the Matter of the Administrative Order Issued to The Dairy Dozen - Thief River Falls, LLP, d/b/a Excel Dairy (Excel Dairy) on July 2, 2009 (A09-1406)

Filed June 1, 2010
Affirmed in part, reversed in part, and remanded; motion denied
Connolly, Judge

Minnesota Pollution Control Agency
File No. MN0068594

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Lori Swanson, Attorney General, Robert B. Roche, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Relator seeks review of the agency's (1) order revoking and reissuing its feedlot permit and denying its request for a contested case hearing; (2) order compelling relator to comply with the new feedlot permit; and (3) denial of relator's request for reconsideration of the administrative order. Because we conclude that the agency properly revoked and reissued relator's permit and did not arbitrarily and capriciously deny relator's request for a contested case hearing, we affirm in part. But because we conclude that the agency abused its discretion in denying relator's request for reconsideration, we reverse and remand in part.

FACTS

These consolidated appeals are the result of an embroiled dispute between relator The Dairy Dozen - Thief River Falls, LLP, d/b/a Excel Dairy (Excel) and respondent Minnesota Pollution Control Agency (MPCA). What began as MPCA-ordered remediation of manure-storage facilities on account of Excel's prior owners ballooned into a civil action with the MPCA, criminal charges by Marshall County, and, most recently, an administrative action by the MPCA.[1] In these consolidated appeals, Excel challenges (1) the MPCA's revocation and reissuance of Excel's National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit and denial of Excel's request for a contested case hearing, and (2) the MPCA's administrative order

[1] The record also reflects that the U.S. Environmental Protection Agency issued Excel a Notice of Violation for its hydrogen-sulfide emissions.

finding Excel violated the reissued permit and subsequent denial of Excel's request for reconsideration.

I. The dairy.

Excel is a total-confinement dairy operation located in Excel Township, which is in Marshall County. Excel's facility includes, among other structures, three total-confinement dairy barns, which are permitted to hold a total of 1,544 animal units,[2] and three clay-lined manure basins (Basins 1, 2, and 3).

Excel was purchased in 2005 by a group of investors known as The Dairy Dozen - Thief River Falls, LLP, which is led by managing partner Rick Millner. Under the previous owners, the facility had one manure basin (Basin 1). In March 2007, the MPCA reissued Excel's NPDES/SDS permit, allowing Excel to add another barn and two additional manure basins (Basins 2 and 3). The NPDES/SDS permit required Excel to inspect the liner of Basin 1 to ensure its integrity as MPCA inspectors noted "deep wheel ruts in multiple locations on the sidewalls of the basin." To verify the integrity of the liner, Excel had to remove approximately three feet of manure sludge from Basin 1. The permit required Excel to "implement and make fully operational" the proposed reconstruction or repair of Basin 1 by November 1, 2007. As part of the permitting process, Excel had to submit an Air Emissions and Odor Management Plan (AEP). The AEP was incorporated into the NPDES/SDS permit.

[2] A mature dairy cow weighing under 1,000 pounds is 1.0 animal units and is 1.4 animal units if it weighs over 1,000 pounds. Minn. Stat. § 116.06, subd. 4a(1)(i), (ii) (2008).

II. Remediation of Basin 1.

At some point, Excel restocked the dairy with cows. During the summer of 2007, Excel built Basins 2 and 3, which were initially constructed incorrectly. Basins 2 and 3 were subsequently approved by the MPCA. It appears that Excel chose to restock the barns and pump additional manure into Basin 1 first and then transferred the manure to Basins 2 and 3, so that it could perform the remediation. Excel was granted an extension until June 1, 2008, to clean out Basin 1.

In early May 2008, Excel began to perform the MPCA-ordered remediation on Basin 1. Prompted by neighbor complaints about odors emanating from Excel, the MPCA began to monitor hydrogen-sulfide emissions, also known as H_2S, on the property while the remediation was taking place.[3] Hydrogen-sulfide emissions are tracked by continuous air monitors (CAMs).[4]

Millner appeared via telephone at the meeting of the Marshall County Board of Commissioners on May 20, 2008. He stated that Excel had a plan to alleviate the odor, which would be implemented before the end of June. Excel began to experiment with

[3] The MPCA is charged with "monitor[ing] and identify[ing] potential livestock facility violations of the state ambient air quality standards for hydrogen sulfide, using a protocol for responding to citizen complaints regarding feedlot odor and its hydrogen sulfide component, including the appropriate use of portable monitoring equipment that enables monitoring staff to follow plumes." Minn. Stat. § 116.0713(a)(1) (2008).

[4] Minnesota's ambient air quality standards provide that there should be no more than two 30-minute periods of hydrogen sulfide above 30 ppb (parts per billion) in five days, or no more than two 30-minute periods of hydrogen sulfide above 50 ppb in any given year. *See* Minn. R. 7009.0080 (2009) (measuring five-day and yearly exposure levels at .03 ppm (parts per million) and .05 ppm, respectively).

biochemical solutions, adding microbes to its manure basins, and installing aerators to hasten the digestive treatment process.

These measures failed to stop the odor problem. Neighbors "reported being physically sickened" by the emissions on numerous occasions. The neighbors experienced "headaches, dizziness, respiratory difficulty, nausea, vomiting, sore throats, and eye irritation. . . . [S]everal of the neighbors ha[d] literally been driven from their homes on numerous occasions as a result of the emissions."

On June 11, 2008, the MPCA notified Excel that Excel's hydrogen-sulfide emissions had exceeded state standards, as reported by two of the CAMs. The MPCA went on to state that Excel's permit required the dairy to "maintain a thick crust on the manure storage basins to minimize air emissions." The MPCA stated that Excel must "immediately comply with this permit requirement" by "apply[ing] straw to the manure basins to promote crust formation, and once crusts form on the basins, Excel must maintain the crusts." Further, the MPCA noted that Excel had agreed to complete the cleanout and repair of Basin 1 no later than June 30, 2008, and that the dairy must comply with that deadline. The MPCA required Excel to respond to its letter within ten days of receipt.

Excel's position was that the AEP did not require it to maintain straw crusts. Excel, through its attorney, attempted to get in touch with the MPCA on June 18 and 19 via telephone and sent correspondence on June 19 via fax trying to address the issues raised in the MPCA's June 11 letter and arrange a meeting. It appears that the MPCA did not respond to Excel's requests, but instead had its attorney call to advise Excel that the

MPCA intended to file a civil complaint against Excel on June 20, 2008. The MPCA subsequently filed a civil action against Excel in district court.

The Minnesota Department of Health and the federal Agency for Toxic Substances and Disease Registry also conducted an exposure investigation at Excel and concluded that the dairy posed a public health hazard to area residents.

III. District court proceedings.

A. Civil proceedings

In its complaint, the MPCA requested that the district court (1) declare Excel's facility a public nuisance; (2) enjoin Excel from further violating state air standards; and (3) order Excel to comply with its NPDES/SDS permit, including establishment and maintenance of a straw cover/crusting and cessation of aeration. The MPCA also asked that Excel be ordered to pay civil fines. Excel opposed the MPCA's motion for a temporary injunction, stating, among other things, that (1) the NPDES/SDS permit did not require crusting; (2) the MPCA's approval was not required for aeration and, in any event, Excel had given the MPCA proper notice; and (3) any emissions violations were caused by the MPCA-ordered remediation and Excel had acted reasonably to minimize or abate any air emissions with the biochemical and aeration treatments. Excel also claimed that it was exempt under Minn. Stat. § 116.0713, subd. 2(b), (c) (2008), while removing the manure to perform remediation on Basin 1, and that the NPDES/SDS permit included a 30-day forbearance agreement.

On July 30, 2008, the district court issued an interim order granting the MPCA's temporary injunction, subject to the terms of its order, and directing the MPCA to

immediately inspect Basin 1 to confirm that the repairs were complete. Excel was directed to (1) immediately complete repairs on Basin 1; (2) begin pumping effluent from Basin 2 into Basin 1 to reach an appropriate level in which to maintain a cover upon MPCA's approval of the repairs; (3) cover Basin 1 either with straw crusting or a synthetic cover; and (4) continue aeration of Basins 2 and 3, but also provide the MPCA with an aeration plan. The district court specifically reserved the right to conduct further hearings to assess the progress of the project.

The district court also stated:

> [Excel] is correct in stating and responding that (A) the MPCA-issued feedlot expansion permit did not require . . . [Excel] to use a natural or synthetic cover on Basin 1, Basin 2 or Basin 3, as alleged by [the] MPCA; and, (B) a primary source of the sickening odors expelled by the facility related to the MPCA-required repair of Basin 1.
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> Nevertheless, any purported omissions or errors by [the] MPCA **did not grant** [Excel]: (A) the right to exceed appropriate limitations for the emission of hydrogen sulfide, as experienced in numerous days and weeks in May and June, 2008; (B) the right to exceed the 21 days allowed for the removal of manure from the facility, which also occurred in May and June, 2008; (C) the right to aerate Basin 3 without express permission and permitting by [the] MPCA; and (D) most importantly, the right to render its neighbors ill by the issuance of sickening odors from the facility.

The district court issued a second interim order on January 2, 2009, concluding "that the parties have been in general compliance" with the prior order, but specifically noted its disappointment in the actions of *both* parties: the MPCA, for failing to promptly certify the remediation on Basin 1, and Excel for failing to obtain a straw chopper/blower as promised so as to more adequately complete the straw cover on Basin 1.

B. Criminal proceedings

Excel was charged with multiple counts of maintaining a public nuisance in violation of Minn. Stat. § 609.74(1) (2008) (stating it is a misdemeanor to "intentionally . . . maintain[] or permit[] a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public"), based on resident complaints regarding the odors emanating from the dairy and the hydrogen-sulfide emissions documented by the CAMs. The charges were subsequently dismissed by a court order.[5] The state timely appealed to this court on May 15, 2009, but subsequently voluntarily dismissed its appeal. *See State v. The Dairy Dozen, LLP*, No. A09-866 (Minn. App. May 26, 2009) (order).

IV. Administrative action.

On January 9, 2009, as part of a required update to the district court regarding the status of the parties' efforts in mediation, Excel stated that it would voluntarily complete the following actions:

(1) Remove all cows by April 15, 2009 (subject to weather conditions);

(2) Remove manure from Basins 2 and 3 while maintaining the natural crust on Basin 1 by July 1, 2009 (subject to weather conditions);

(3) Submit a permit amendment application to the MPCA by March 1, 2009

> to (a) maintain a natural crust on [Basin 1], (b) install an impermeable cover on [Basin 2]; (c) install a permeable cover on [Basin 3]; (d) relocate the manure transfer pipe and make the other manure management improvements which [Excel] has previously proposed to [the] MPCA without response,

[5] The district court judge who presided over the criminal matters was a different judge than the one presiding over the civil proceedings.

> and (e) upon [the] MPCA's approval of (a) through (d), increase the herd by approximately 300 cows to 2,000 animal units.

It is undisputed that Excel removed all of the cows from its facilities as it said it would. It does not appear that Excel submitted the permit amendment application.

A. April 29 administrative order: revoking & reissuing NPDES/SDS permit & denying contested case hearing request

On February 27, 2009, the MPCA notified Excel that it had made a preliminary determination to revoke and reissue Excel's NPDES/SDS permit. A draft copy of the new permit was provided to Excel, and a public comment period took place.

On April 28, 2009, the MPCA Citizens' Board[6] approved the findings of fact, conclusions of law, and order denying both Excel's and the neighbors' requests for a contested case hearing and revoking and reissuing Excel's NPDES/SDS permit. On April 29, 2009, the MPCA issued its order. In addressing the 12 issues proposed by Excel in support of its request for a contested case hearing, the MPCA concluded that ten issues were legal issues and did not amount to disputed material issues of fact; three issues presented no disputed issues of material fact; and, on eight issues, Excel had failed to demonstrate that a contested case hearing would allow for the introduction of new information that would be helpful to the MPCA in reaching a decision on the matter.

[6] "The MPCA, which has a commissioner and a nine-member Citizens' Board with the commissioner serving as chair of the board, administers the laws relating to preservation of the environment and protection of the public health consistent with the economic welfare of the state." *In re Annandale NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 506 n.1 (Minn. 2007).

The MPCA then went on to identify three reasons for revoking and reissuing Excel's NPDES/SDS permit pursuant to Minn. R. 7001.0170 (2009). The MPCA concluded that Excel had altered or modified the dairy in ways "that result in or have the potential to result in significant alteration of the nature or quantity of air emissions" generated by the dairy and the "nature or quantity of permitted materials stored, processed, discharged, emitted, or disposed of by the permittee"; there was "information previously unavailable to the [MPCA] showing that the terms and conditions of the permit do not accurately represent the actual circumstances relating to the permitted facility or activity"; and the situation was such that the dairy "endanger[ed] human health and the environment and that changes in the permitted activity would remove the danger to human health or the environment." *See* Minn. R. 7001.0170(A), (B), (F).

The new NPDES/SDS permit included a schedule of compliance which required, among other things, that Excel remove and land apply all manure from Basins 1, 2, and 3, and remove remaining feedstocks from its facility no later than June 1, 2009. Excel was also required to maintain proper freeboard[7] levels in each basin.

[7] The MPCA describes "freeboard" as the "extra capacity in a manure storage structure that is needed to maintain structural integrity and to ensure that manure does not overflow."

B. June 2009 violations & July 2 administrative order: finding violations of NPDES/SDS permit, ordering immediate action to ensure no manure overflow & removal of manure in Basins 2 and 3

On June 8, 2009, the MPCA notified Excel that Excel had violated its NPDES/SDS permit by failing to meet the June 1 deadline to remove the feedstocks.[8] In a letter e-mailed on June 12, 2009, along with other various requests to modify its permit, Excel objected to the removal of its feedstocks and asked for additional time to empty its manure basins due to wet field conditions. The MPCA denied these requests, concluding that they were not minor modifications and, therefore, needed to go through the formal amendment process.

On June 17, 2009, the MPCA notified Excel that it had failed to timely remove and land apply the manure in its basins,[9] and that an inspection had revealed that Basins 1 and 2 were completely full and that Basin 3 was near freeboard level. The MPCA also reiterated that Excel needed to complete removal of the remaining feedstocks. The MPCA Citizens' Board held a hearing on June 23, 2009, to receive a status update on the dairy. Millner testified that Excel had been unable to land apply the manure because the conditions were simply too wet, but that they were ready to proceed as soon as the fields dried out.

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[8] The MPCA also stated that Excel had violated other conditions of its NPDES/SDS permit by failing to provide various plans and specifications for the manure basins and failing to submit its land application agreements, and that the MPCA had observed a "dead cow/animal" floating in Basin 1.

[9] While the NPDES/SDS permit originally required Excel to remove the manure by June 1, it was determined that the fields were too wet for land application, and the deadline to empty the basins was moved to June 12, 2009.

On July 2, 2009, the MPCA issued an administrative order concluding that Excel had violated the terms of its NPDES/SDS permit by failing to empty its manure basins by June 12, 2009; continuing to exceed state ambient air standards for hydrogen sulfide; and failing to maintain freeboard requirements in the manure basins. The MPCA ordered Excel to take immediate action to ensure that its basins did not overflow and to commence emptying Basins 2 and 3. The MPCA gave Excel 14 days from receipt of its order to empty the basins.

C. Request for reconsideration & July 20 administrative order denying reconsideration

On July 13, 2009, Excel sought reconsideration of the July 2 order. Excel stated "material evidence" had developed since the July 2 order concerning freeboard levels in the manure basins and field conditions. On July 20, the MPCA denied Excel's request for reconsideration stating that Excel failed to cite a proper legal basis for its request and, assuming Excel had intended to bring its request under Minn. Stat. § 14.64 (2008), the request was untimely. The MPCA further stated that Excel's request was not supported by relevant or credible evidence and the evidence presented in conjunction with the request was contradicted by the overwhelming evidence supporting the July 2 order. Lastly, the MPCA stated that the information presented in Excel's reconsideration request would not be made part of the administrative record because it was not submitted in a proper or timely manner and was not relevant, credible, or material to the MPCA's July 2 order.

V. Appellate proceedings.

We consolidated Excel's certiorari appeals in A09-936 (appealing denial of request for a contested case hearing and agency's revocation and reissuance of an NPDES/SDS permit) and A09-1406 (appealing permit violations order and denial of reconsideration request) pursuant to Excel's request. The MPCA has also filed a motion to strike portions of Excel's principal brief and appendix.

D E C I S I O N

We review the MPCA's decisions involving "environmental review" pursuant to the Minnesota Administrative Procedure Act at Minn. Stat. § 14.69 (2008). *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) (*MCEA*) (holding that, although usually applied to review of a decision from a contested case hearing, the Minnesota Administrative Procedure Act also applies to "an area such as environmental review, uniquely involving application of an agency's expertise, technical training, and experience"). Under the Minnesota Administrative Procedures Act, we may affirm the agency's decision; remand the matter for further proceedings; or reverse or modify the agency's decision if the agency's findings, inferences, conclusions, or decisions are affected by an error of law, unsupported by substantial evidence in view of the record as a whole, or arbitrary or capricious. Minn. Stat. § 14.69.

"Decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *MCEA*,

644 N.W.2d at 463 (quotation omitted). Accordingly, when an agency's decision relies upon the application of its technical knowledge and expertise to the facts presented, deference should be afforded to the agency. *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 119 (Minn. 2009) (*In re 2005 Automatic Adjustment*). Notably, "[t]he MPCA has technical expertise regarding water, air, and land pollution." *MCEA*, 644 N.W.2d at 465.

An "agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (quotation omitted) (*In re Excess Surplus Status*). However, "[i]f the agency's decision represents its will, rather than its judgment, the decision is arbitrary and capricious." *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999). An agency's decision

> is arbitrary and capricious if the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*). Importantly, "[i]f there is room for two opinions on a matter, the [agency's] decision is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached." *In re 2005 Automatic Adjustment*, 768 N.W.2d at 120.

I. The MPCA's decision to revoke and reissue Excel's NPDES/SDS permit was not arbitrary and capricious.

The MPCA is responsible for issuing NPDES/SDS permits to feedlot operators. Minn. Stat. § 116.07, subd. 7c(a) (2008). The MPCA also has the power to modify or revoke and reissue NPDES/SDS permits. Minn. R. 7001.1150, subp. 1 (2009). Among other reasons, the MPCA may revoke and reissue an NPDES/SDS permit if (1) alterations or modifications to the permitted facility or activity "will result in or have the potential to result in significant alteration in the nature or quantity of permitted materials to be stored, processed, discharged, emitted, or disposed of by the permittee"; (2) "the commissioner receives information previously unavailable to the agency that shows that the terms and conditions of the permit do not accurately represent the actual circumstances relating to the permitted facility or activity"; or (3) "the commissioner finds that the permitted facility or activity endangers human health or the environment and that a change in the operation of the permitted facility or in the conduct of the permitted activity would remove the danger to human health or the environment." Minn. R. 7001.0170(A), (B), (F).

The MPCA found that Excel failed to maintain a straw crust on its manure basins; utilized aeration and biological treatments that had not been approved by the MPCA; and appeared to have stocked its facilities beyond the permitted number of animal units. Based on these findings, the MPCA concluded that Excel had altered or modified its facilities in a manner that will result in or have the potential to result in a significant alteration to the nature or quantity of air emissions from the dairy and that the terms of

Excel's previous NPDES/SDS permit did not represent the actual circumstances of the dairy. *See id.* (A), (B).

The MPCA further found that Excel had exceeded Minnesota's ambient air quality standards for hydrogen sulfide "hundreds of times" from May 2008 through October 2008; exceeded the maximum number of exempt days for manure removal; and allowed manure-contaminated runoff to discharge into the waters of the state. The MPCA observed that Excel's neighbors had reported a variety of adverse health effects on account of the emissions and, at times, had "been driven from their homes" and that the dairy had been declared a public health threat as a result of the emissions. On these bases, the MPCA revoked and reissued Excel's NPDES/SDS permit.

Excel contends that it did not significantly alter[10] its facilities as it was not required to provide straw crusting to its manure basins; it notified the MPCA regarding

[10] Excel asserts in its reply brief that the MPCA is "effectively advocat[ing]" under the "precautionary principle" in its determination of a significant alteration under Minn. R. 7001.0170(A). In the supplemental appendix to its reply brief, Excel attaches a few excerpted pages from In re Exemption Application by Minn. Power for a 345/230 kV High Voltage Transmission Line, OAH Docket No. 10-2901-12620-2 (Jan. 29, 2001), decided by the Minnesota Office of Administrative Hearings. *Available at* http://www.oah.state.mn.us/cases/arrowhead/arrowhead.rt.html. Excel attempts to import procedures and principles from proceedings related to the Minnesota Environmental Quality Board (MEQB), yet Minn. R. 7001.1150 (governing modification, revocation, and reissuance of NPDES/SDS permits) specifically states that "[i]n addition to parts 7001.0170 and 7001.0190, subparts 2 and 3 [of this rule] apply to the modification or revocation and reissuance of national pollutant discharge elimination system permits." Excel has cited no legal authority for its attempt to import MEQB procedures into this MPCA proceeding, nor has it in any way demonstrated that it is entitled to supplementary review of the MPCA's decision to revoke and reissue its NPDES/SDS permit. *See* Minn. R. 9200.3700 (2009) ("[T]he [MEQB] may entertain a petition for supplementary review whenever an authorized applicant has received all necessary permits from the Pollution Control Agency for a proposed facility but a political subdivision has refused to approve

aeration and was ordered by the district court to continue aerating and biochemically treating Basins 2 and 3; and the MPCA did not have any proof that its facilities were overstocked. Excel further argues that it cannot be considered to have engaged in activity that would result in a danger to human health because the hydrogen-sulfide standards are invalid as a matter of law.

First, the justifications for NPDES/SDS permit revocation and reissuance are connected with an "or" and are thus disjunctive, allowing for revocation and reissuance on any one of the justifications under Minn. R. 7001.0170. *See Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 385 (Minn. 1999) ("Absent context revealing that the word 'or' should be read as a conjunctive, we have generally read 'or' to be disjunctive."). Therefore, taking into account the required deference to the MPCA's technical expertise, if the MPCA properly revoked and reissued Excel's NPDES/SDS permit on one of the three justifications cited under Minn. R. 7001.0170, we will affirm the revocation and reissuance of Excel's NPDES/SDS permit. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating appellate courts "will not reverse a correct decision simply because it is based on incorrect reasons"). For purposes of our analysis, the MPCA's reasons for revoking and reissuing Excel's NPDES/SDS permit will be broken into two groups: revocation and reissuance based on alterations or modifications to the facility and

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the establishment or operation of the facility."). Minnesota law does recognize, however, that "almost every human activity has some kind of adverse impact on a natural resource" and environmental laws cannot be construed as "prohibiting virtually all human enterprise." *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 265 (Minn. 1997) (quotations omitted).

pursuant to previously unavailable information, *see* Minn. R. 7001.0170(A), (B), and revocation and reissuance based on endangerment to human health, *see id.* (F).

A. Revocation and reissuance based on alterations or modifications to the facility and pursuant to previously unavailable information, Minn. R. 7001.0170(A), (B)

The MPCA offered the same three reasons for revoking and reissuing Excel's NPDES/SDS permit under Minn. R. 7001.0170(A) and (B): Excel did not apply a straw crust to its manure basins; Excel did not seek approval before beginning aeration of the manure basins; and Excel appears to have exceeded its allotted number of animal units.

Beginning with the crusting issue, Excel contends that the MPCA is collaterally estopped from arguing that Excel's prior NPDES/SDS permit required it to use straw crusting on its manure basins because of the district court's July 30 interim order in the civil proceedings, in which the district court specifically found that "the MPCA-issued feedlot expansion permit did not require . . . [Excel] to use a natural or synthetic cover on Basin 1, Basin 2 or Basin 3, as alleged by [the] MPCA." For collateral estoppel to apply, however, there must be a final judgment on the merits. *See In re Trust Created by Hill*, 499 N.W.2d 475, 484 (Minn. App. 1993) ("Collateral estoppel prevents a party from relitigating issues if (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party in the prior case; and (4) there was a full and fair opportunity to be heard on the issue."), *review denied* (Minn. July 15, 1993). Excel is correct in that the district court's July 30 order granting the MPCA's request for a temporary injunction was an appealable order under Minn. R. Civ. App. P. 103.03(b) (stating appeals may be taken "from an order which grants, refuses,

dissolves or refuses to dissolve, an injunction"). Excel stresses that it has been over a year since the order was issued and, because the MPCA has not exercised its right to appeal, the order is effectively final. We reject this argument for two reasons. First, the rules of appellate procedure state that the time for filing an appeal from an appealable order is "60 days after service by any party of written notice of its filing." Minn. R. Civ. App. P. 104.01, subd. 1. The record currently before this court, however, does not address whether either party has served the other with written notice of the order's filing, and it appears to us that the civil matter is still ongoing. Therefore, it is possible that the time has not run on the MPCA's opportunity for appeal and that the district court's order is not final. *See Curtis v. Curtis*, 442 N.W.2d 173, 176 (Minn. App. 1989) (ruling appeal of an order almost four years old was timely where the record lacked any showing that written notice of filing had been served). Second, whether an appeal is or could be timely is distinct from whether finality exists for purposes of collateral estoppel. *See Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 572 (Minn. App. 1984) (stating, when addressing the applicability of collateral estoppel, that "an appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain res judicata until it is reversed" (quoting *State ex rel. Spratt v. Spratt*, 150 Minn. 5, 7, 184 N.W. 31, 32 (1921))).

Nevertheless, the record does not appear to substantially support the MPCA's conclusion that Excel was required by the terms of its prior NPDES/SDS permit to use straw crusting on its manure basins to control air emissions. The language of the permit states that "[t]he Permittee *shall* implement the MPCA-approved Air Emissions Plan

(AEP) referenced in Part 1.2 [sic] of this Permit. The AEP *shall* be implemented and maintained at the Permittee's Facility and is considered an enforceable part of this Permit." (Emphasis added.) Excel appears correct in asserting that "1.2" is a typographical error as there is no "Part 1.2" in the permit, but it does contain a "Part 2.2," specifically incorporating Excel's AEP dated September 11, 2006. Although the AEP in the record is not dated, the MPCA does not appear to contest that this was the September 11, 2006 AEP submitted by Excel. Likewise, the MPCA provides no citation to the so-called "narrative" AEP it contends was submitted by Excel, requiring such action. The administrative record for these consolidated cases contains over 13,000 pages. We remind the parties of their obligation to properly cite to the record. Minn. R. Civ. App. P. 128.03 ("Whenever a reference is made in the briefs to any part of the record which is reproduced in the addendum or appendix or in a supplemental record, the reference shall be made to the specific pages of the addendum or appendix or the supplemental record where the particular part of the record is reproduced. Whenever a reference is made to a part of the record which is not reproduced in the addendum or appendix or in a supplemental record, the reference shall be made to the particular part of the record, suitably designated, and to the specific pages of it."); *see Cole v. Star Tribune*, 581 N.W.2d 364, 371-72 (Minn. App. 1998) (addressing a failure to provide adequate cites to the record).

As indicated on the AEP, one of the options to control air emissions is technology number 23: "maintain crust by switching to straw bedding." Excel's application does not list technology 23 as a utilized technique, but states the permittee would use technology

number 22, "separate solids with settling basin or liquid/solid separator." Therefore, the record does not substantially support the MPCA's conclusion that revocation and reissuance was justified by Excel's failure to employ straw crusting under either Minn. R. 7001.0170(A) or (B).

Similarly, the record also does not substantially support the MPCA's revocation and reissuance of Excel's permit because Excel allegedly exceeded its permitted number of animal units. The language in the MPCA's order suggests the number of animal units that may be at Excel, but does not conclude that an actual exceedance has occurred. At the April 28, 2009 hearing, when a member of the MPCA Citizens' Board asked about the number of animal units at the facility, the MPCA responded:

> Our belief is that there were probably 1,544. The issue really is about what the weight of the animals are.
>
> And that's why in the permit—the dairy maintains that the cows that they have are a type of cow that's a Jersey-Holstein cross that weighs about 1,000-pound [sic], which would mean one animal unit per cow. Typical dairy cows are about 1,400 pounds, which would be about 1.4 animal units per cow.
>
> So we have not gone in—or we did not—when there were cows at the facility, we did not go in and do a head-by-head count because, for it to really provide useful information, we would had to have actually weighed cows, in addition to just counting them.
>
> And in consultation—and to do that, we felt we would actually need a search warrant to do that. We had discussions with the county attorney and decided we did not have the evidence necessary to proceed with that. And so that's why we did not go in and do a count and verify the weight of the animals at the facility.

Much different than the MPCA's power to request information on the number of animals at the facility to ensure compliance with environmental laws,[11] revocation and reissuance requires finding that "alterations or modifications to the permitted facility or activity" have occurred "that will result in or have the potential to result in significant alteration in the nature or quantity of permitted materials to be stored, processed, discharged, emitted, or disposed of by the permittee," Minn. R. 7001.0170(A), or that the MPCA "receive[d] information previously unavailable to the agency that shows that the terms and conditions of the permit do not accurately represent the actual circumstances relating to the permitted facility or activity," *id.* (B), based on the justifications cited by the MPCA. Without substantial evidence to support that these conditions actually occurred, the agency's decision to revoke and reissue Excel's NPDES/SDS permit based on alleged overstocking is arbitrary and capricious.

However, the record does substantially support the MPCA's revocation and reissuance of Excel's NPDES/SDS permit under Minn. R. 7001.0170(A) for implementing biochemical and aeration techniques to control the hydrogen-sulfide emissions. The record does not appear to reflect, and the parties do not appear to dispute, that Excel's AEP did not include aeration. Aeration does not even appear as one of the options for emissions control.

Excel notified the MPCA in late May 2008, that it had begun biochemically treating Basin 2 with microbes and had ordered an aeration system. Microbes were subsequently added to Basin 3 in June. When granting the MPCA's temporary

[11] *See infra* discussion at II.

injunction, the district court allowed Excel to continue experimenting with the "non-crusting odor management treatment of Basins 2 and 3, including aeration," but required it to submit an aeration plan to the MPCA within ten days of its order. The district court also "specifically reserve[d] the right to require [Excel] to provide a natural or synthetic cover to Basin 2 or Basin 3, cease the aeration in Basin 2 and/or 3 and/or take further action to address the presented problems."

It is not clear from the record whether Excel submitted anything to the MPCA after the district court's July 30 interim order, but the record does contain a letter from the MPCA to Excel dated August 1, 2008, stating it had received Excel's July 24, 2008 aeration system proposal and that "[t]he MPCA remain[ed] skeptical of the proposed aeration system's effectiveness largely due to the high strength of the waste and the lack of a proven track record of success for aeration in the dairy sector." The MPCA went on to "recognize[] that pursuant to the Court's interim order in this case, [Excel] has been given an opportunity to implement aeration. The MPCA, therefore, encourages [Excel] to take steps that [Excel] believes are necessary to alleviate the ongoing air quality problem as soon as possible." Excel was allowed to experiment with aeration for months. From May 22, 2008, until September 22, 2008, Excel exceeded the state ambient-air quality standards for hydrogen sulfide hundreds of times. The MPCA removed the CAMs in the fall due to freezing temperatures; neighbors confirmed that the odors continued through the winter.

Minn. R. 7001.0170(A) allows the MPCA to revoke and reissue an NPDES/SDS permit when alterations or modifications have occurred to the permitted facility "that will

result in or have the potential to result in significant alteration in the nature or quantity of permitted materials to be stored, processed, discharged, *emitted*, or disposed of by the permittee." (Emphasis added.) Documentation in the record shows that Excel exceeded the hydrogen-sulfide standards on at least 55 days during the time in which the MPCA was measuring the emissions and Excel was using aeration. Under Minn. Stat. § 116.0713, subd. 2(c), a livestock facility is exempt from state ambient-air quality standards for a maximum of 21 days during the manure removal process.[12] Furthermore, the extent to which a particular means of controlling air emissions will result in or have the potential to result in a significant alteration of emitted material is primarily factual and such that it necessarily requires application of the MPCA's technical expertise to the circumstances of the dairy. *See In re 2005 Automatic Adjustment*, 768 N.W.2d at 119-20 (deferring to agency when decision is one in its area of expertise such that it "necessarily requires application of the agency's technical knowledge and expertise to the facts presented" (quotation omitted)). By implementing biochemical and aeration techniques, Excel modified its facility in a manner that significantly increased the quantity of its hydrogen-sulfide emissions generated by its manure basins. Any arguments that the MPCA was notified of the aeration and did not object to its use are without merit based on the broad language of Minn. R. 7001.0170(A) as the aeration plainly did not reduce the emissions and the MPCA had the power to revoke and reissue the permit based on an alteration or a modification that will result in or have the potential to result in a

[12] *See infra* discussion at I.C.1 (addressing Excel's argument that the statute permits the dairy 28 days of exemption). Notably, even with 28 days, Excel nearly doubled its allotted exemption.

significant alteration to the quantity of emitted material. Therefore, the record substantially supports the MPCA's decision to revoke and reissue Excel's NPDES/SDS permit based on Excel's implementation of biochemical and aeration techniques for emissions control, significantly altering the quantity of emissions emanating from its facility.

To the extent that Excel appears to argue that the district court's interim orders in some way stayed action by the MPCA, this is unavailing. Although reserving the right to order Excel to cease aeration and take further action in the future, the district court said nothing about restricting the MPCA's ability to act. And, albeit several months prior to the administrative proceedings to revoke and reissue Excel's NPDES/SDS permit and around the time Excel's criminal case was also pending, the district court's July 30 interim order "specifically note[d] that [it] [did] not affect any other proceeding presently pending against [Excel]."

B. Revocation and reissuance because the permitted facility endangers human health or the environment and that a change in the operation of the facility would remove the threat, Minn. R. 7001.0170(F)

Because the record substantially supports the MPCA's decision to revoke and reissue Excel's NPDES/SDS permit under Minn. R. 7001.0170(A), we need not address the MPCA's justification for revocation and reissuance under Minn. R. 7001.0170(F) for violations of health standards and Excel's challenge to the validity of Minnesota's ambient air quality standards for hydrogen sulfide.

C. Excel's "affirmative defenses"

1. Exemption period under Minn. Stat. § 116.0713

Excel asserts as an affirmative defense that Minn. Stat. § 116.0713 allows the dairy a total of 28 days each year in which it is exempt from the hydrogen-sulfide standards during manure removal. Minn. Stat. § 116.0713 provides that:

> (b) Livestock production facilities are exempt from state ambient air quality standards while manure is being removed and for seven days after manure is removed from barns or manure storage facilities.
>
> (c) For a livestock production facility having greater than 300 animal units, the maximum cumulative exemption in a calendar year under paragraph (b) is 21 days for the removal process.

Excel construes subdivisions (b) and (c) to mean that it has 21 days of exemption while manure is being removed and an additional 7 days after removal while things "settle."

Given the statute's plain language, we doubt whether Excel correctly reads the statute. Even if Excel correctly reads the statute, however, the record plainly reflects that Excel exceeded state hydrogen-sulfide standards on at least 55 days while aerating its manure basins. Therefore, we conclude that Excel's proffer of Minn. Stat. § 116.0713 as an affirmative defense is unpersuasive.

2. Section 4.6(C)(1) "forbearance" provision

Excel also asserts that the MPCA should have forgiven any exceedances under section 4.6(C)(1) of the NPDES/SDS Permit because Excel timely submitted an operation

management plan (OMP) to control the hydrogen-sulfide emissions.[13] Excel describes section 4.6(C)(1) as a "forbearance" provision and likens it to Minn. Stat. § 116.072, subd. 5 (2008), which governs administrative monetary penalties imposed by the MPCA. We disagree.

Contrary to Excel's reading, section 4.6(C)(1) is not a 30-day provision in which Excel "can take affirmative action" to remediate its hydrogen-sulfide emissions. Section 4.6(C)(1) mandates that Excel submit an OMP within 30 days on how the dairy "will manage the manure storage system to assure compliance with the state ambient hydrogen sulfide standards . . . during daily operations and during agitation and pump-out," except during the statutory exemption period.

As the MPCA points out, section 4.6(C)(1) "in no way grants [Excel] extra hydrogen sulfide exemption days or precludes the MPCA from taking affirmative action to bring [Excel] into compliance with hydrogen sulfide standards. Section 4.6(C)(1) says nothing whatsoever about the MPCA waiving any rights or authorities it has to enforce applicable environmental protection laws." Minn. Stat. § 116.072 gives the MPCA discretion to issue an order requiring violations to be corrected and assessing a monetary penalty. Minn. Stat. § 116.072, subd. 1(a) (2008) (stating the agency "*may* issue an order

[13] We have been unable to locate in the record the OMP Excel claims was sent to the MPCA on June 27, 2008. The citation in Excel's principal brief is to a July 22, 2008 affidavit by Millner in which Excel "proposes additions to its six-step proposal" and provides a "red-lined version," but does not explicitly address whether that red-lined version is of the original OMP submitted on June 27. We note that the June 30, 2008 Millner affidavit, also cited by Excel, does not appear to be in the record. *See* Minn. R. Civ. App. P. 128.03.

requiring violations to be corrected and administratively assessing monetary penalties for violations of this chapter[,] . . . any rules adopted under [this] chapter[], and any standards, limitations, or conditions established in an agency permit" (emphasis added)). In contrast, "when livestock production facilities are found to be in violation of ambient hydrogen sulfide standards," the MPCA "*must* . . . take appropriate actions necessary to ensure compliance, utilizing appropriate technical assistance and enforcement and penalty authorities provided to the agency by statute and rule" pursuant to Minn. Stat. § 116.0713(a)(2) (emphasis added). Nothing in section 4.6(C)(1) limits the MPCA's authority to pursue further action against Excel. Moreover, to the extent Excel argues that the district court's orders (1) adopted an interim plan similar to Excel's OMP because the parties "to this point and time, have been apparently unable to facilitate" one and (2) concluded that Excel has been in "general compliance" with the interim plan, the orders themselves also did not limit the MPCA's power to act. Thus, we reject Excel's forbearance-based affirmative defense.

3. Section 9.2(H) "upset" defense

Finally, Excel asserts that the MPCA erroneously interpreted the "upset" provision, section 9.2(H), of the NPDES/SDS permit. Excel contends that the MPCA's revocation and reissuance of its NPDES/SDS permit is simply an enforcement action in disguise and that the "upset" defense is not confined to water discharges. The MPCA asserts that revocation and reissuance of Excel's NPDES/SDS permit was a "permitting" action, not an enforcement action, and that the "upset" defense only applies to violations

of effluent limitations, which it describes as "water discharges that are beyond the permittee's control."

Section 9.2(H) of the NPDES/SDS permit states:

> H. Upset Defense. If the Permittee wishes to establish an affirmative defense to an MPCA enforcement action due to an upset, the Permittee shall provide a written report of any upset within thirty days of the upset. The Permittee shall demonstrate compliance with Minn. R. 7001.1090, *subp. 3(L),*[14] including the following listed below:
>
> 1. The specific cause of the upset;
> 2. That the upset was unintentional;
> 3. That the upset resulted from factors beyond the control of the Permittee, and did not result from operational error, improperly designed or inadequate manure storage basin or other facilities and treatment works, lack of preventive maintenance, or increases in production that exceed the design basin capacity for the facility;
> 4. That the facility was being properly operated at the time of the upset;
> 5. That the Permittee notified the Minnesota Department of Public Safety Duty Officer . . . no later than 24 hours after the upset started; and
> 6. That the Permittee took all reasonable steps to minimize harm to human health, public drinking water supplies, and the environment resulting from the upset.

(Emphasis added.) The permit does not define "upset" and the term does not appear to be used in any other section.

[14] We note that Minn. R. 7001.1090 (2009) (setting forth the general conditions for NPDES/SDS permits) does not contain a subpart 3(L). Subpart 3 contains only items (A) through (C). *See* Minn. R. 7001.1090, subp. 3. Most likely, there is a typographical error in the permit and the correct provision is at subpart 1(L), which the MPCA cites in its brief.

There is no definition of "upset" in Minn. R. 7001.1090 or Minn. R. 7001.1020 (2009) (defining terms for rules related to NPDES/SDS permits).

Minn. R. 7001.1090, subp. 1(L) states:

> L. In the event of temporary noncompliance by the permittee *with an applicable effluent limitation* resulting from an upset at the permittee's facility due to factors beyond the control of the permittee, the permittee has an affirmative defense to an enforcement action brought by the agency as a result of the noncompliance if the permittee demonstrates by a preponderance of competent evidence:
>
> (1) the specific cause of the upset;
> (2) that the upset was unintentional;
> (3) that the upset resulted from factors beyond the control of the permittee and did not result from operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or increases in production which are beyond the design capability of the treatment facilities;
> (4) that at the time of the upset the facility was being properly operated;
> (5) that the permittee properly notified the commissioner of the upset . . . ; and
> (6) that the permittee implemented . . . remedial measures . . . by ["tak[ing] all reasonable steps to minimize the adverse impacts on human health, public drinking water supplies, or the environment resulting from the noncompliance"].

(Emphasis added) (quoting Minn. R. 7001.0150, subp. 3(J) (2009)). The language of section 9.2(H) and subpart 1(L) is nearly identical, but the permit removes the "effluent limitation" language contained in the rule. By definition, an "effluent limitation" can only occur with a water discharge. *See* Minn. R. 7001.1020, subp. 13 (defining "effluent limitation" as "a restriction established by rule or permit condition on quantities,

discharge rates, and concentrations of pollutants that are discharged from point sources into waters of the state").

The "upset" defense, however, is a *defense* to an enforcement action. The enforcement power of the MPCA is set forth in Minn. Stat. § 115.071 (2008), which allows the agency to enforce various environmental laws

> and all rules, standards, orders, stipulation agreements, schedules of compliance, and permits adopted or issued by the agency thereunder or under any other law now in force or hereafter enacted for the prevention, control, or abatement of pollution . . . *by any one or any combination* of the following: criminal prosecution; action to recover civil penalties; injunction; action to compel performance; or other appropriate action, in accordance with the provisions of said chapters and this section.

Minn. Stat. § 115.071, subd. 1 (emphasis added). Subdivision 3 allows the agency to seek civil penalties of not more than $10,000 per day of violation for non-hazardous waste violations. *Id.*, subd. 3. Minn. Stat. § 116.072 gives the MPCA the authority to impose the same monetary penalties administratively. When the MPCA filed its action against Excel in district court, the MPCA also sought civil penalties pursuant to Minn. Stat. § 115.071, subd. 3, along with the injunction. The rules governing the administrative procedures for revoking and reissuing NPDES/SDS permits do not contain any references to defenses and do not appear to limit the MPCA's ability to revoke and reissue a permit while a related action is pending in district court. *See* Minn. R. 7001.0170, .0190, .1150 (2009). While the practical effect of both pursuing Excel in district court while simultaneously revoking and reissuing Excel's NPDES/SDS permit through an administrative proceeding looks like a single enforcement action, they are

separate proceedings under the law and, even if we were to accept Excel's construction of section 9.2(H) as providing an "upset" defense for air-emissions violations, revocation and reissuance of a permit is not an enforcement action.

Moreover, section 9.2(H) requires Excel to take certain steps, including preparing a written report within 30 days of the "upset" and notifying the proper authorities. Excel broadly asserts, with no citation to the record, that it has "substantially complied with all reporting and corrective requirements" and that the "MPCA has claimed no prejudice associated with any alleged non-compliance." Thus, even if we were to adopt Excel's construction, Excel provides no legal authority entitling it to an "upset" defense without satisfying the permit's mandatory requirements. This court declines to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

In sum, while the record does not substantially support the MPCA's conclusions that Excel was required to crust its manure basins or that the dairy had in fact exceeded its number of animal units, the record does substantially support the agency's conclusion that Excel altered its facilities in a manner that significantly increased its air emissions. This finding was sufficient to support revocation and reissuance of Excel's NPDES/SDS permit under Minn. R. 7001.0170(A) and, therefore, we affirm the MPCA's April 29 order.

II. The MPCA did not arbitrarily and capriciously deny Excel's request for a contested case hearing.

Denials of contested case hearing requests are also reviewed under Minn. Stat. § 14.69. *In re Solid Waste Permit for the NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 403 (Minn. App. 1988) (*In re Red Wing Ash*), *review denied* (Minn. May 18, 1988). When revocation and reissuance of an NPDES/SDS permit is proposed, the permittee may request a contested case hearing. Minn. R. 7001.0190, subp. 1.[15] A contested case hearing must be held if:

> A. there is a material issue of fact in dispute concerning the matter pending before the board or commissioner;
> B. the board or commissioner has the jurisdiction to make a determination on the disputed material issue of fact; *and*
> C. there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter.

Minn. R. 7000.1900, subp. 1 (2009) (emphasis added). A "material issue of fact" is a "fact question, as distinguished from a policy question, whose resolution could have direct bearing on a final board or commissioner decision." Minn. R. 7000.0100, subp. 5b (2009).

The party requesting a contested case hearing has the "burden of demonstrating the existence of material facts that would aid the agency before [it is] entitled to a contested case hearing." *In re Red Wing Ash*, 421 N.W.2d at 404. "It is simply not

[15] However, should the NPDES/SDS permit be revoked *without reissuance*, the permittee is *entitled* to a contested-case hearing. Minn. R. 7001.0190, subp. 4 (when a permittee has been notified of a proposal to revoke a permit and requests a contested case hearing, "the agency shall hold the hearing").

enough to raise questions or pose alternatives without some showing that evidence can be produced which is contrary to the action proposed by the agency." *In re Amendment No. 4 to Air Emission Facility Permit No. 2021-85-OT-1*, 454 N.W.2d 427, 430 (Minn. 1990).

Excel identified 12 primary issues in its request for a contested case hearing. On appeal, Excel appears to be asserting that four issues involve disputed material facts: (1) whether the CAM data was reliable; (2) whether Excel engaged in overstocking; (3) whether the feedpad discharge was inappropriate; and (4) whether removal of the feedstocks was required.[16]

We begin with Excel's request for a contested case hearing on the issue of the reliability of the CAM data. Excel contends that its due-process rights were violated because the MPCA has failed to produce the "raw" milliamp data generated by the CAMs. The milliamp data is converted by the CAM into 15-minute "average" hydrogen-sulfide concentrations, which is then translated by intermediary data loggers into half-hour intervals because the hydrogen-sulfide standards are based on a half-hour average. *See* Minn. R. 7009.0080. In support of its position, Excel cites a criminal case for the proposition that due-process rights are violated when data relied upon is not available to the opposing party for independent review. *See State v. Schwartz*, 447 N.W.2d 422, 427 (Minn. 1989) ("The fair trial and due process rights are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross examination.").

[16] In this appeal, we note that Excel appears to have recast as legal arguments a number of the "material fact" issues it previously identified, such as the validity of the hydrogen-sulfide standards and its affirmative defenses based on language of the permit.

Even in contested case hearings, the proceedings are not governed by the rules of evidence. *See* Minn. Stat. § 14.60, subd. 1 (2008) ("In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence."). Similarly, quasi-judicial proceedings "do not invoke the full panoply of procedures required in regular judicial proceedings." *In re North Metro Harness, Inc.*, 711 N.W.2d 129, 136 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. June 20, 2006). "The due process rights required are simply reasonable notice of a hearing and a reasonable opportunity to be heard." *Id.* Excel does not dispute that it received notice of the April 28 hearing or that it had an opportunity to be heard.

As stated above, this court defers to the MPCA's expertise in areas of pollution. *MCEA*, 644 N.W.2d at 464-65. Additionally, "[w]here there are technical disputes and uncertainties, the court must assume that the agency or [responsible government unit] has exercised its discretion appropriately." *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*, 531 N.W.2d 847, 881 (Minn. App. 1995) (concluding, in light of party's failure to show scientific data documenting the DNR's concerns regarding forest fragmentation, county correctly concluded project did not have potential for significant environmental effects), *review denied* (Minn. July 28, 1995). It appears to us that Excel is attempting to invoke the *Frye-Mack* standard for scientific evidence regarding the reliability of the CAM data. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000)

(rejecting the *Daubert* approach and reaffirming the *Frye-Mack* standard, which includes a requirement that scientific evidence have "foundational reliability," requiring "the proponent of a test to establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability" (quotation omitted)).

The MPCA's order goes into great detail on how hydrogen-sulfide emissions are measured; the means of calibration for the CAMs; and the general acceptance of CAMs for measuring such emissions. Therefore, despite the general requirement that a party must demonstrate the reliability of the scientific evidence before it can be considered, the MPCA's expertise in this area controls and Excel has not satisfied its burden in providing new evidence unknown to the MPCA in support of its contested case hearing request.[17]

Much like the CAM data, Excel argues that it should be able to have the extrapolation calculation used by the MPCA in reaching its conclusion that Excel *appears* to have overstocked its facilities. While Excel contends that it had evidence ready to present to show that the facility was not overstocked, the MPCA correctly concluded that a contested case hearing was not required on this point because of the MPCA's enforcement and investigative powers and duties. *See* Minn. Stat. § 115.03, subd. 1(a) (charging the MPCA with "administer[ing] and enforc[ing] all laws relating to the pollution of any of the waters of the state"), (b) (charging the MPCA with

[17] We also note that the record indicates that the MPCA is likely not able to provide the data that Excel is requesting. An e-mail from the Marshall County assistant attorney to Excel's attorney states: "You have all the raw data from the data loggers. There is nothing more raw we can provide to you."

"investigat[ing] the extent, character, and effect of the pollution of the waters of this state and [gathering] data and information necessary or desirable in the administration or enforcement of pollution laws") (2008). Excel's NPDES/SDS permit also required it to, when requested, "submit within a reasonable time the information and reports that are relevant to the control of pollution regarding the construction, modification, or operation of the Facility covered by the permit or regarding the conduct of the activity covered by the permit." *See* Minn. R. 7001.0150, subp. 3(H) (requiring inclusion of a clause stating that "[t]he permittee shall, when requested by the commissioner, submit within a reasonable time the information and reports that are relevant to the control of pollution regarding the construction, modification, or operation of the facility covered by the permit or regarding the conduct of the activity covered by the permit").

As for the discharge running off of Excel's feedpad, Excel does not dispute a discharge occurred. The dairy claims, however, "that the stormwater retention pond released controlled overflow as designed and as approved by the MPCA" and that the agency offered no evidence that the runoff was contaminated with manure. Excel has offered no specific facts in support of its contention. *See In re Red Wing Ash*, 421 N.W.2d at 404 (concluding party had "not raised any fact issues which could be resolved in a contested case hearing" when they failed to provide "any indication of what specific *new facts* an expert might testify to"). The MPCA has supported its conclusion with laboratory test results showing a high level of fecal contamination in the sample. Excel claims to have never seen these results before and that it is "entitled to an opportunity to test this basis in a contested case hearing." Excel has cited no authority entitling it to

challenge the agency's evidence before the agency can take action or any authority entitling it to discovery. Notably, absent authorization by rule or statute, an agency may not establish or adopt discovery procedures. *See Waller v. Powers Dep't Store*, 343 N.W.2d 655, 657-58 (Minn. 1984) (holding district court erred in compelling discovery when city ordinance did not authorize civil rights commission to provide discovery procedures to hearing participants). There is substantial support in the record for the MPCA's contamination conclusion and we will not disturb the agency's decision. Furthermore, to the extent that Excel is arguing that the MPCA was precluded from relying on the discharge because the MPCA approved the feedpad's design, Excel's NPDES/SDS permit expressly stated, as was required by Minn. R. 7001.0150, subp. 3(B) (2009), that "[t]he Agency's issuance of this permit does not prevent the future adoption by the Agency of pollution control rules, standards, or orders more stringent than those now in existence and does not prevent the enforcement of these rules, standards or orders against the Permittee."

Lastly, with respect to the feedstocks, Excel claims that the MPCA has pointed to no legal violations associated with Excel's feed storage practices, and that the feedstock provision was not added until after the close of the public comment period. First, Excel provides no legal argument or citation to support any implied argument that the MPCA improperly added the provision and that a legal violation must occur before the MPCA can require Excel to alter its storage practices. Again, we decline to address allegations unsupported by legal analysis or citation. *Ganguli*, 512 N.W.2d at 919 n.1. Second, the MPCA correctly points out that Excel was notified in writing of the revised draft permit

as part of the "packet" mailed out approximately ten days before the hearing. Likewise, at the start of the April 28, 2009 hearing, the MPCA staff specifically stated that the NPDES/SDS permit draft had been revised to include the feedstocks provision based on comments received, and, while Excel's counsel stated that Millner would address the new permit conditions, the transcript reflects, and Excel does not appear to contest, that Millner failed to raise the issue of the feedstocks at the hearing. Arguments not raised at the administrative hearing are not properly before this court. *See In re Stadsvold*, 754 N.W.2d 323, 327 (Minn. 2008) (concluding issue of whether setback requirements in county ordinance could be applied to a grandfathered nonconforming lot was not properly before appellate court as it had not been presented to or considered by the county board (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988))).

Because of the deference accorded to the MPCA in the determination of environmental issues and because Excel has not properly met its burden by demonstrating there were issues of material fact that were not known to the agency and would otherwise aid its decision, the MPCA's denial of Excel's request for a contested case hearing is affirmed.

III. The MPCA abused its discretion in denying Excel's request for reconsideration of the July 2 administrative order.

On July 2, 2009, the MPCA concluded that Excel violated the terms of its new NPDES/SDS permit by failing to empty its manure basins by June 12, 2009; failing to maintain proper freeboard requirements in the basins; and continuing to exceed ambient air quality standards for hydrogen sulfide. The MPCA ordered Excel to take immediate

action to ensure its manure basins did not overflow and to immediately commence emptying Basins 2 and 3.

On July 13, 2009, Excel requested reconsideration of the July 2 order, stating material evidence had developed since the agency's decision. Excel stated that its engineer concluded that the basins were not into freeboard and, based on the MPCA's visit to the dairy on July 8, 2009, the MPCA was aware of the wet field conditions and that Excel began the land-application process as soon as possible. Excel also stated that nearby farmers had not planted their fields on account of the wet conditions. Excel included a letter from its engineer and signed statements from its pumpers stating Excel had made arrangements with them; Excel separately sent three signed statements from farmers describing the conditions.

The MPCA denied Excel's request for reconsideration. The MPCA concluded that (1) Excel had failed to cite a proper legal basis for its request; (2) assuming Excel had intended to cite Minn. Stat. § 14.69, Excel's request was untimely; (3) Excel's request was not supported by relevant or credible evidence; and (4) Excel's request was contradicted by overwhelming evidence in the July 2 order. The MPCA then determined that any information sent by Excel in its July 13 request would not be added to the MPCA's administrative record based on the foregoing reasons.

In appealing these orders, Excel does not appear to separately contend that the July 2 administrative order was arbitrary and capricious as issued apart from the July 20 denial of reconsideration. Rather, Excel's argument appears to be that information provided to the MPCA in Excel's request for reconsideration shows that the MPCA's

decision was arbitrary and capricious because of the MPCA's failure to change the order based on the conclusions of the inspection of the MPCA's own engineer that the fields were still too wet for the manure to be absorbed. Therefore, we examine whether the MPCA's denial of Excel's reconsideration was proper. Although not measured by the substantial-evidence standard, this court likewise "accord[s] deference to an administrative agency's decision to deny a request for rehearing and will reverse that decision only for an abuse of discretion." *In re Claim for Benefits by Hagert*, 730 N.W.2d 546, 550 (Minn. App. 2007).

A. Legal basis for reconsideration request

In its July 20 order denying Excel's request for reconsideration, the MPCA stated that Excel failed to "cite a proper statutory or other legal basis for the request," observing that "[t]he only statute cited by [Excel], Minnesota Statutes, Section 514.64 is a repealed section of Chapter 514 of Minnesota Statutes, which addresses various types of liens and lien proceedings." The MPCA stated that it had not invoked any lien authority over Excel. The MPCA went on, however, to consider Excel's request as if it was "intended as a request for reconsideration of the [July 2 order] for purposes of Minnesota Statues, Section 14.64."

Excel does not dispute that it did not provide a statutory basis for its request and does not appear to dispute that Minn. Stat. § 514.64 is a repealed statute and not germane to its request. Indeed, Minn. Stat. § 514.64 was repealed in 1949. 1949 Minn. Laws ch. 273, § 1, at 503 (repealing "Minnesota Statutes 1945, Section 514.64; relating to liens for services of stallions or jackasses"). The MPCA clearly recognized, however, that there

was a typographical error in Excel's request and that Excel most likely was referring to Minn. Stat. § 14.64, which discusses the review process in contested case hearings and requests for reconsideration to the administrative agency.

Administrative agencies have an inherent authority to reconsider their decisions. *In re North Metro Harness, Inc.*, 711 N.W.2d at 135. Agencies have "a well-established right to reopen, rehear, and redetermine the matter even after a determination has been made." *Id.* (quotation omitted). As recognized in *In re North Metro Harness, Inc.*, the Minnesota Supreme Court has stated that "'[t]his power lasts until jurisdiction is lost by appeal or certiorari or until a reasonable time has run, which would be at least coextensive with the time required by statute for review." *Id.* at 135-36 (quoting *Anchor Cas. Co. v. Bongards Co-op. Creamery Ass'n*, 253 Minn. 101, 106, 91 N.W.2d 122, 126 (1958)). Thus, Excel was not required to cite a statutory basis for its review as the MPCA still retained jurisdiction over the July 2 order as Excel did not petition for a writ of certiorari until July 31, 2009.

B. Timeliness of reconsideration request

While the MPCA still retained jurisdiction over the administrative proceedings, Excel was still required to seek reconsideration in a timely manner. *Id.* A request for reconsideration of an agency's decision "is not a prerequisite for appellate review, but, if a request for reconsideration is made within ten days after the agency decision, the time for serving and filing the petition for certiorari does 'not begin to run until service of the order finally disposing of the application for reconsideration.'" *Little v. Arrowhead Regional Corrections*, 773 N.W.2d 344, 345 (Minn. App. 2009) (quoting Minn. Stat.

§ 14.64). Thus, Excel's request for reconsideration needed to be submitted within ten days of the MPCA's July 2 order.

The MPCA concluded, however, that Excel's "request dated July 13, 2009, was submitted 11 days after the decision and order, [and] does not meet the deadline imposed under Section 14.64." July 2, 2009 was a Tuesday. The ten-day timeline would mean Excel's request was due on July 12, 2009. July 12 was a Sunday. Minnesota law provides that

> [w]here the performance or doing of any act, duty, matter, payment, or thing is ordered or directed, and the period of time or duration for the performance or doing thereof is prescribed and fixed by law . . . . [and] [w]hen the last day of the period falls on Saturday, Sunday, or a legal holiday, that day shall be omitted from the computation.

Minn. Stat. § 645.15 (2008). Excel's request indicates that it was both faxed and e-mailed to the MPCA on July 13; the MPCA does not dispute that it received the request on July 13. Excel's request was timely and the MPCA abused its discretion in denying reconsideration on the basis of timeliness.

C. Analysis of reconsideration request

The MPCA stated that the "evidence" submitted by Excel in support of its request "consist[ed] of unverified representations by Excel about statements purportedly made to MPCA staff and other events that purportedly occurred in the week following the issuance of the July 2 [order]." The MPCA concluded that this "after-the-fact information . . . is irrelevant, lacks credibility, and cannot be relied on by [the] MPCA."

In its request for reconsideration, Excel made statements regarding wet field conditions that had been observed by and discussed with MPCA employees Gaylen Reetz and George Schwint during an on-site inspection on July 8, 2009, and submitted a letter from its engineer concluding that the manure basins were not into freeboard and two signed, but unsworn statements from its pumpers concerning the arrangements that were made for pumping. Excel also stated that some farmers in the area were preparing statements regarding their field conditions; these were submitted the next day in the form of signed, but unsworn statements. Without citing any legal authority, the MPCA concluded that this information would not be made part of the administrative record because it was not properly or timely submitted and it was "not relevant, credible or material to the issuance of the [July 2 order]." We address the documentary evidence first, followed by the July 8 inspection.

To the extent that Excel's request was to be filed within ten days of the July 2 order, the July 14 farmers' statements were not timely submitted. Second, as noted above, the traditional rules of evidence do not apply to administrative proceedings. In contested case hearings, "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence." Minn. Stat. § 14.60, subd. 1. Deference is also accorded to "an agency's conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony." *In re Excess Surplus Status*, 624 N.W.2d at 278. To the

extent that the MPCA chose to disregard Excel's engineers and the statements of the pumpers in denying the reconsideration request, this was within the MPCA's discretion.

The conversations that occurred with MPCA staff and the observations that were made during the July 8 on-site inspection are entirely another matter. These observations go to the most fundamental issue of whether Excel could have, in fact, complied with the June 12 deadline for manure removal based on the wet field conditions and, thus, go to whether the July 2 order was arbitrary and capricious, i.e., whether there was substantial evidence to support the MPCA's decision that Excel had the ability to remove the manure sooner than it did.

Excel began to pump the manure from Basins 2 and 3 and land apply it to nearby fields on approximately July 7, 2009. On July 8, MPCA staff members Reetz and Schwint visited Excel. Schwint is an MPCA feedlot program engineer; Reetz is an MPCA regional division director. At the time Excel submitted its request for reconsideration, it referred to conversations that took place with MPCA staff during the July 8 inspection, but Excel did not have "proof." Eight days after the MPCA denied Excel's request for reconsideration, the MPCA Citizens' Board had a meeting during which a compliance update was presented regarding Excel. Schwint and Reetz each testified at the July 28 hearing. The MPCA has moved to strike the transcript of the July 28 hearing and Excel's accompanying argument that the MPCA ultimately conceded that Excel reasonably complied with the manure removal requirements as matters outside the record on appeal. For reasons detailed below, the MPCA's motion is denied.

During the July 28 hearing, Schwint testified that:

> The next picture illustrates the condition of the land that [Excel] was applying to. You can see it has standing corn on it and was just harvested the previous week, as evident by the combine standing in the field. You also note the tractor pulling a disk in the background. [Excel] chose to disk land prior to land application in order to help facilitate drying of the soils. *MPCA staff concurred with [Excel] that it appeared that on this particular acreage, land application manure could not have taken place sooner than it was accomplished. However, this does not mean that other acreage was not available and—is not available for land application. Just this particular acreage became available at this time.*

(Emphasis added.) The following exchange also took place between a member of the MPCA Citizens' Board and Reetz:

> BOARD MEMBER: But within the efforts that we've seen by the dairy, do you think there could have been more? Has some of the permits [sic] been impossible to meet due to the geographic location, maybe the climatic conditions that exist up there, or do you think that we're pretty much where we should be at this time or there should be more done?
>
> . . . .
>
> REETZ: *I am convinced that they would have had a very hard time having pumped this sooner*, in the sense that we talked to one of the farmers who had finished harvesting his corn, basically, the night before, immediately started disking his fields so that they'd be ready to receive the manure.
>
> And I think, you know, hydrologically, as far as how much manure could be applied, you know, they had proposed originally 24,000 gallons per acre, and it was down—it would only accept about 20,000. So they made those adjustments. *You know, I think, in terms of the conditions that they had up there, they probably—and the land that was available to them and that they ended up applying to, I think they probably did it as soon as they could have*.

(Emphasis added.) This testimony simply reflects what Excel and the MPCA discussed at the July 8 inspection, subsequent to the MPCA's July 2 order, but prior to its determination on Excel's request for reconsideration. The MPCA argues that Excel "is attempting to present evidence in this certiorari appeal that was not presented to the MPCA until after the MPCA had made the decisions being challenged." We disagree.

On July 9, 2009, Reetz sent an e-mail to 12 individuals, including MPCA Commissioner Paul Eger, and the MPCA's southwest regional manager Randall Hukriede. He wrote that

> [l]and application was going well [sic] the manure was being injected into corn ground that had been tilled with chisel plow/disc. The soil conditions were wet such that they could apply 20,000 gallons per acre. Tractors were slipping a little, but doing a very good job. . . . This is a brief update, more detail and pictures later.

This document *was* part of the agency record and plainly suggests that the MPCA was aware of the soil conditions.

It is true, as the MPCA argues, that Schwint visited Excel on June 12, 2009, and confirmed that there were some fields that were dry enough to land apply the manure. At the June 23, 2009 MPCA Citizens' Board meeting, in responding to a question from Commissioner Eger regarding the condition of the fields, Schwint stated:

> SCHWINT: Mr. Chair, let me just give you a little update here. June 12th, when we were up there for the site visit, that's the last time I was up there, people were actively working the fields. Now, it was damp, but you could still get in and work the fields. As [MPCA Citizens' Board member] Schiefelbein pointed out, there are fields that are dry enough. *You may not be able to get it all out, but you'll be able to get it started and get a piece here, a piece there done.*

> It may cost more money. It may involve paying somebody to not plant crops if you're going to make the field too wet. It's not economically maybe the best solution, but it is the solution that we've put in our permit, get that manure out of there.
> EGER: And can you remind me and for the benefit of the Board, that is the requirement in the permit, to get the manure basins emptied. It wasn't contingent upon there being the ability to land apply. It could have been pumping it out and trucking it out somewhere; is that correct?
> SCHWINT: That is correct, Mr. Chair. The permit discussion that we had that day in April was the 30-day extension, basically, for road restrictions, so they could haul it out. *And we said, "Where there's a will, there's a way."* There was [sic] you could haul it south. You could truck it out, truck it to some different fields. That was the intention of that provision of the permit.

(Emphasis added.) The language of the new NPDES/SDS permit specifically stated that Excel "shall remove and land apply all Manure from [Basins 1, 2, and 3]."

Moreover, Schwint's testimony also reflects that, even if Excel had land applied to some fields, there may still not have been enough dry land.[18] The MPCA's own order recognized the difficulty Excel was likely to encounter in attempting to remedy the violation: "Although heavy rains in the past week may make it difficult for [Excel] to land apply manure from [Basins 2 and 3], MPCA technical staff and Marshall County feedlot staff [have] concluded that land application of manure could take place in five to

[18] We note that Millner testified at the June 23 hearing that land applying the manure in a piecemeal approach would actually make the emissions worse by continuously agitating it.

seven days."[19] The MPCA then proceeded to give Excel 14 days to clean out Basins 2 and 3.

It is undisputed that Excel had not complied with the terms of its NPDES/SDS permit. There were other alternatives the dairy might have taken to remedy the problem as discussed by Schwint; however, the new permit required Excel to land apply the manure: "[t]he Permittee shall remove and land apply all Manure." The MPCA has not provided any legal argument or citation to the record in support of its 14-day deadline other than to refer back to its own order. While this court defers to the MPCA's technical expertise in matters involving environmental review, at the same time, the MPCA's decision must be based on more than the agency's will that the manure be cleaned up in that timeframe. *See CARD*, 713 N.W.2d at 832 (listing agency's entire failure to consider an important aspect of the problem in defining arbitrary and capricious); *Pope County Mothers*, 594 N.W.2d at 236 (stating an agency's decision is arbitrary and capricious if it "represents its will, rather than its judgment"). Therefore, given the facts of this particular case, we conclude that the MPCA abused its discretion in denying Excel's request for reconsideration and reverse and remand the MPCA's July 20 order for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded; motion denied.

[19] The MPCA also states that field conditions were confirmed by the Marshall County Feedlot Officer. To support this assertion, however, the MPCA merely cites its own order, and we have not been able to locate any evidence of this conversation in the record.